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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1990

DANIEL LEARY,
Petitioner,

v

STATE OF MICHIGAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

– AND APPENDIX –

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QUESTION PRESENTED

DOES THE SCOPE OF A SEARCH AUTHORIZED BY A DETAINEE'S CONSENT FOR THE SEARCHING OFFICER TO "LOOK IN" HIS AUTOMOBILE EXTEND TO THE OPENING OF CLOSED, OPAQUE CONTAINERS WITHIN THE AUTOMOBILE?

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OPINIONS BELOW

The opinions of the trial court (the Circuit Court for the County of Oakland), and the Michigan Court of Appeals are unreported, but are set forth in full hereinafter at Appendix A-1 and A-5, respectively.

The November 29, 1990, Order of the Michigan Court of Appeals denying leave to appeal is likewise unreported, but is set forth in full hereinafter at Appendix A-11.

JURISDICTION

The Michigan Supreme Court denied leave to appeal from the decision of the Michigan Court of Appeals on November 29, 1990. This Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV, United States Constitution, provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . .

Amendment XIV, Section I, United States Constitution provides, in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

Article I, Section II, Michigan Constitution, provides:

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

STATEMENT OF THE CASE

This case arose out of events which followed a minor traffic accident involving cars driven by the Petitioner and one George Durkee on the afternoon of December

28, 1982. Officer John Samuilow of the Troy, Michigan Police Department, who was on routine patrol duty, responded to a report of the accident and found both cars and both drivers awaiting him in a gas station.

Officer Samuilow asked both men for their driver's license and automobile registration; Petitioner, who ultimately produced a Florida license, made some inquiry as to what a Michigan vehicle registration looked like, and, after the document was described to him by Officer Samuilow, went to the car he had been driving, and returned with Michigan vehicle registration and proof of insurance for the car which, according to Samuilow, appeared to be in order, although in the name of another person.

While Petitioner was retrieving the documents requested by Officer Samuilow, Durkee, the driver of the other car involved in the accident, confided to the officer that he had some suspicions about the Petitioner. According to Samuilow, Durkee told him that the Petitioner "had acted very upset when the accident occurred," and did not want the police called. He also told Samuilow that, while waiting for the police to arrive, the Petitioner had given a "box of some sort" to the occupants of another vehicle which had arrived at the scene, and in Durkee's opinion, the Petitioner acted as if he "was under dope." Although Officer Samuilow did not claim to have had previous acquaintance with or information regarding either Durkee or the Petitioner, he testified that these statements aroused his suspicions, specifically regarding the possibility that Petitioner might have been involved in drug trafficking, and he decided to investigate these suspicions while going through the accident reporting procedures.

Officer Samuilow then directed both Petitioner and Mr. Durkee to get into the back seat of his patrol

vehicle, which was parked behind, and blocking the movement of, the two vehicles which had been involved in the accident. He testified that this was his standard procedure in filling out an accident report (which he then began to do), but he acknowledged as well that he intended, in questioning Petitioner, to follow up on his suspicions about the Petitioner and drug trafficking.

Officer Samuilow testified that, even though the information was not specifically called for by the accident report form which he was filling out, and even though the registration documents were in order (and he had no information suggesting that the car had been stolen, or taken without permission), he asked Petitioner on three different occasions about the relationship between himself and the owner of the vehicle he had been driving, and received three different answers — his brother-in-law, his step-brother and "a friend." When asked on direct examination "What was going through your mind?" as he repeated these inquiries, Officer Samuilow testified that he was "suspicious of the actions that had happened before I had arrived on the scene as far as the giving of the package to people in the other car." His suspicions, he testified, were heightened because the Petitioner's eyes were red, and he repeatedly wiped his nose and face.

When asked, however, Petitioner denied having given a package to anyone, and denied that he had been drinking or using drugs.

Officer Samuilow then asked Petitioner whether there was anything in his car "that should not be there." The testimony as to what happened next is rife with contradiction (both between the versions offered by the Petitioner and the officer, and also between the different accounts offered by the officer at various

hearings), only some of which are resolved by the findings of the trial court.

Thus, while Officer Samuilow testified at the evidentiary hearing on the Motion to Suppress that, when asked whether there was "anything" in his car, Petitioner responded "No, go ahead and take a look for yourself," he was impeached by his preliminary examination testimony, in which he did not claim that Petitioner volunteered such an invitation, but, rather, that he asked specifically "whether he would mind if I took a look in the car," and received an affirmative reply.

Petitioner, on the other hand, denied that he either invited the officer to search his car, or agreed to such a search. It was his testimony that, after he answered "No" to the question of whether there was "anything" in his car, Samuilow responded "Well, if that's the case, then you wouldn't mind if I looked in your car." Unsure of his rights, and surprised by the accusatory tone which questioning he had thought pertained to a simple traffic accident had taken, he responded "Do what you have to do," intending to leave it up to the officer to decide what he could or could not do under the circumstances. He testified that he did not intend to give Samuilow permission to search, and that although he did not intend to give Samuilow permission to search, and that although he did not know what the officer was going to do next, he did not think that "looking in" the car meant anything like a search of its contents, and that he did not tell the officer not to "look in" the car because he was afraid that an outright refusal "might have just gave him just cause" to search.

The trial court did not explicitly resolve these factual disputes, but apparently did not credit or rely upon Samuilow's testimony that the Petitioner volunteered an invitation to search his car; instead, the Opinion

recites that Samuilow "asked Defendant if he could look in the automobile."

After having concluded his colloquy with Petitioner – – whatever it may have been — Officer Samuilow proceeded to enter and search Petitioner's vehicle, leaving Petitioner and Mr. Durkee in the back seat of the patrol car. In the back seat of the car Petitioner had been driving, Samuilow found an open cardboard box and a closed brown plastic jar (found by the trial court to have been opaque) bearing a "filler bits" (actually the trade name "Filarbits") label — which Samuilow testified that he recognized as a veterinary medicine. The jar, Samuilow testified, "aroused my curiosity," and he opened it, looking for contraband. In the bottle, in addition to Filarbits tablets, Samuilow found nine plastic bags containing white powder which he suspected and which turned out to contain cocaine.

Throughout the proceedings in the state court, Petitioner resisted the prosecution's theory that the search and seizure which led to his prosecution was authorized by his free and voluntary "consent." He specifically argued that, even if he had been shown to have "consented" to have Officer Samuilow "look in" his car, that "consent" did not authorize the opening of the closed containers in which the cocaine was found. The trial court and the Michigan Court of Appeals rejected these arguments, and the Michigan Supreme Court denied review on this issue by Order of November 29, 1990. Since then, this Court has granted certiorari in *Florida* v. *Jimeno*, No. 90-622, presenting a similar issue regarding the proper scope of a "consent search" of an automobile.

REASON FOR GRANTING THE WRIT

CONSENT TO "LOOK IN" AN AUTOMOBILE CANNOT JUSTIFY THE OPENING OF OPAQUE CLOSED CONTAINERS FOUND WITHIN THE AUTOMOBILE.

As a general proposition, it is clear that the "scope of consent search is limited by the breadth of the actual consent itself." *United States* v. *Gay*, 774 F.2d 368, 377 (10th Cir. 1985), and that "when the basis for a search and seizure is consent, the government must conform to the limitations" of the consent given. *Mason* v. *Pulliam*, 557 F.2d 426, 429 (5th Cir. 1977) *See also*, *Walter* v. *United States*, 447 U.S. 649 (1980). As Professor LaFave has noted, "Consents to search are not given in the abstract." 3 LaFave, *Searches and Seizures*, 2d ed. (1987) at 160, and it is clear that the scope of a defendant's consent may be limited not only by the express terms in which he gives it, but by the terms of the request to which he accedes or the circumstances under which the consent is requested or given. *See, e.g.*, *United States* v. *Rackley*, 742 F.2d 1266, 1271 (11th Cir. 1984); *United States* v. *Rubio*, 727 F.2d 786, 796 (9th Cir. 1983); *United States* v. *Dichiarinte*, 445 F.2d 126, 129 (7th Cir. 1971). As the Eleventh Circuit wrote in *United States* v. *Milian-Rodriguez*, 759 F.2d 1558, 1563 (11th Cir. 1985), "The government may not use consent to a search which was initially described as narrow as license to conduct a general search."

As noted previously, Petitioner testified that Samuilow expressed a desire to "look in" his car. While Samuilow's testimony was inconsistent as to this bit of conversation with Petitioner, the trial court found that he "asked Defendant if he could look in the automobile." This finding is, of course, supported by Samuilow's specific testimony at the preliminary exam-

ination that his conversation with Petitioner was framed in terms of whether Petitioner would have any objections if the officer "took a look in the car." At most, then, the record establishes that Petitioner consented to or acquiesced in "a look in" or "a look inside" the vehicle.

Petitioner testified that, although he had no fixed idea of what Officer Samuilow might do in regard to his vehicle, he understood that the officer's desire to "look in" the car contemplated at most a limited visual inspection, and not the intensive rummaging through the contents of the car which Samuilow in fact conducted (and which he testified he tried to stop). Indeed, such an understanding of a proposed "look in" or "look inside" the car seems reasonable, and consistent with the commonly accepted definition of the word "look" which implies, in general terms, visual inspections, rather than more intrusive examination; of parenthetical interest perhaps, is the fact that the definition of "look" as meaning "to search for" is considered archaic, at least according to Webster, Ninth New Collegiate Dictionary, p. 704 (1987). Thus common sense, common knowledge and any reasonable view of the facts of this case compel the conclusion that, even if Officer Samuilow secured Petitioner's consent to "look in" or "look inside" his car, such authorization would not have extended to the opening of closed containers within the vehicle. This conclusion, it might be noted, is supported by the holding of *State* v. *Cuzick*, 21 Wash. App. 511; 585 P.2d 485 (1978), that a defendant's permission to "look in" a car cannot be construed as authorizing the opening and search of luggage within the vehicle.

Such a conclusion would seem obviously to follow from the ordinary principles of law applicable to con-

sent searches, and the plain meaning of language such as that employed in the case at bar. While this Court's decision in *United States* v. *Ross*, 456 U.S. 798 (1982) may be taken as equating the proper scope of searches conducted with and without a warrant, it does not alter the fundamental principles of law applicable to the scope of a consent search, or expand the permissible scope of such a search. As the Florida Supreme Court held in *State* v. *Wells*, 539 So.2d 464, 466-467 (Fla. 1989):

> *Ross* clearly stands for the proposition that, so long as probable cause exists to search an automobile, the police lawfully can search any container found inside. Thus, the *Ross* Court upheld the search of an automobile after the police received a tip from a reliable informant that drugs were being sold from the vehicle, stopped it and found a paper bag and a zippered pouch containing contraband and a large amount of cash. 456 U.S. at 800-01, 102 S.Ct. at 2160-61. Based on these facts, *Ross* held: "If *probable cause* justifies the search of a lawfully stopped *vehicle*, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.* at 825, 102 S.Ct. at 2173 (emphasis added).
>
> There was no issue of a consent search in *Ross*. Indeed, the principles that apply to probable cause searches are totally incongruous to the freedom of choice inherent in consent. As *State* v. *Fuksman*, 468 So.2d 1067 (Fla. 3d DCA 1985), and the district court below recognized:
>
> > The considerations upon which the holding in *Ross* is grounded do not exist in the consent search context where there is no prob-

> able cause. If a person consents to the search of a vehicle containing luggage and a search of the *vehicle alone* reveals nothing, the problem of the possible greater intrusion by detention or seizure does not arise because the probable cause necessary to secure the warrant is nonexistent. Therefore, the officer has no dilemma because he has no choice; he must let the consenting party be on his way. It is because the citizen has not given the police probable cause to believe his vehicle contains contraband that he has the right to proceed without official interference. Absent probable cause, the police can engage in the greater intrusion of searching the luggage only under circumstances in which the scope of the consent to search is defined clearly enough to include the luggage.

Fuksman, 468 So.2d at 1070. A consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances. *Id.* On the other hand, a probable cause search and its scope are compelled, no matter what might be the wish of the individual. A theory based on consent and one based upon state-sponsored coercion thus are incompatible, and fusing them could lead to absurd results. Under such logic, the search of the trunk of a car would be permitted even if the defendant had said, "You can look in my car but *not* in my trunk."

On December 3, 1990, this Court granted certiorari in *Florida* v. *Jimeno*, Docket No. 90-622, a case which specifically addresses the propriety of this holding. The

case at bar presents the identical issue. Certiorari should, therefore, be granted in this case as well.

The Court might well also consider granting certiorari to correct the lower courts' misperception of the constitutional protection afforded closed containers, and to underscore once again the constitutional impermissibility of drawing a distinction between "worthy" and "unworthy" containers.

Notwithstanding the fact that all of the testimony established that the box and bottle in which the cocaine was found were opaque, the trial judge held that Petitioner had no reasonable expectation of privacy in their contents, because they did not appear to be "personal luggage," and because "their contents can be inferred from their outward appearance," citing the Michigan Court of Appeals decision in *People* v. *Klager*, 107 Mich. App. 812, 817-818 (1981). The Michigan Court of Appeals did little more than affirm the trial court's decision as not being "clearly erroneous."

Of course, the only "announcement" which the containers bore as to the nature of their contents was the "Filarbits" label. If the label were to be thought to accurately reflect the contents, there would be simply no basis upon which the search could be upheld, since this veterinary medicine is clearly not contraband. Rather, the decisions below must rest upon the perception that the containers did not sufficiently resemble "personal luggage" so as to be entitled to constitutional protection.

In *United States* v. *Ross*, 456 U.S. 798 (1982), which, this Court, following *dicta* in *Robbins* v. *California*, 453 U.S. 420, 426-427 (1981), held that there is no constitutionally permissible distinction between "worthy" and "unworthy" containers, since "the Fourth Amend-

ment provides protection to the owner of every container that it conceals its contents from plain view." Indeed, treating containers differently to the extent that they do or do not resemble conventional ideas of "personal luggage" would allow for (or encourage) the drawing of invidious distinctions between the rich, who could afford proper "personal luggage," and the poor, who might have to make do with whatever sort of container came to hand. Thus, no matter how unconventional or informal a container which *may* serve as a repository for personal effects, all such containers are constitutionally equals.

Obviously, a container which is transparent affords no reasonable expectation of privacy in its contents, and, as the case law recognizes, a container which, by its nature, "clearly announces" its contents provides no greater degree of privacy than if it were transparent, both as a matter of common sense and constitutional law. *See, e.g., Arkansas* v. *Sanders*, 442 U.S. 754, 764-767 (1979). But the opaque plastic jar in this case cannot be held, as the court below did, to fall within the ambit of this principle. All that the label "announced" was what the container had once held, not what was in it at the time that the officer observed it, and unless the Petitioner's authorization to search can properly be held to include the opening of closed containers in the vehicle — which it clearly cannot — the opening of the bottle constituted a separate invasion of his constitutionally protected expectations of privacy. Indeed, if the label did in fact "announce" the contents of the bottle, there is no reason why the officer should have opened it, other than idle curiosity or a generalized desire to rummage through Petitioner's effects — a level of intrusion which was clearly unconsented to and unexpected — since there is no legitimate reason why Officer Samuilow would have wished to examine heartworm pills for animals.

The decisions of the courts below represent fundamental misapplications of these principles, and bespeak a need for further guidance from this Court, rendering the grant of certiorari sought herein proper.

CONCLUSION

For the reasons stated above, this Honorable Court should grant the within Petition for a Writ of Certiorari to the Michigan Supreme Court, and reverse and remand the decisions below with appropriate instructions.

Respectfully submitted,

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Dated: January 24, 1990

No. _____

In The

Supreme Court of the United States

October Term, 1990

DANIEL LEARY,

Petitioner.

v

STATE OF MICHIGAN,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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PER CURIAM OPINION dated December 27, 1989, Michigan Court of Appeals A-5

ORDER dated November 29, 1990, Michigan Supreme Court A-11

OPINION

(State of Michigan – Circuit Court – County of Oakland)

(Dated July 11, 1984)

(PEOPLE OF THE STATE OF MICHIGAN, vs. DANIEL LEARY, Defendant — No. 83-57858-FY)

This matter comes before this Court on Defendant's Motion to suppress evidence. Defendant contends that the cocaine found in the car he was driving was the product of an illegal search.

A hearing was held by this Court on February 23, and March 29, 1984. At this hearing, Officer Samuilow testified that while investigating a traffic accident involving Defendant and one George Durkee, Mr. Durkee informed the Officer that prior to the officer's arrival, the Defendant gave a small package to a third person who left with the package. Officer Samuilow testified that when he questioned the Defendant about the accident, he noticed that Defendant's eyes were red and that Defendant kept wiping his nose and eyes without apparent reason. Officer Samuilow also testified that when he asked Defendant about the ownership of the car, Defendant gave three different responses. Officer Samuilow testified that he became suspicious that narcotics were involved and asked Defendant if he could look in the automobile. The record is conflicting as to Defendant's reply. The Defendant asserts that he made a statement not intended as permission to search the automobile. Officer Samuilow testified that Defendant gave consent to search the automobile.

The Defendant argues that the State has not carried its burden of proving that the Defendant voluntarily

and freely consented to the search of the automobile and its contents.

This Court is not persuaded by Defendant's argument. Whether a consent is valid is a matter of fact based upon the evidence and all reasonable inferences to be drawn from it. *People* v *Chism*, 390 Mich 104, 123 (1973). In *People* v *Reed*, 393 Mich 342, 363 (1975), citing *Schneckloth* v *Bustamonte*, 412 US 218, 248-249 (1973), the Court states:

> "[W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecutor is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."

In applying *Reed, supra*, to the instant case, this Court finds Defendant's consent to search the vehicle was given voluntarily and was not the product of duress or coercion.

Defendant also argues that he was illegally detained when the alleged "consent" to search the car occurred. This Court finds nothing unreasonable about having the Defendant sit in the rear of the patrol car until an accident report is completed. The mere fact that Defendant was detained at the time of the consent does not render the consent invalid. *People* v *Klager*, 107 Mich App 812, 817 (1981).

Defendant contends the Officer failed to inform Defendant of his right to refuse to consent to the search. However, this is only one factor to be considered. *People* v *Reed, supra,* at 363. Moreover, Defendant asserts the officer mislead the Defendant during the investigation and this conduct cannot support a valid consent. This Court is not persuaded by Defendant's argument here. Officer Samuilow's questioning as to the automobile's contents were limited prior to Defendant's consent, such that the process of investigation did not invalidate the search.

Nor did Officer Samuilow's search of the bottle in the car excede (sic) the scope of the alleged consent. In *People* v *Klager, supra,* the Court addressed a situation where the police officer received consent to search Defendant's trunk; and upon examining the trunk, found a gray metal cash box which the Officer opened, finding stolen property. The Court held the search valid, noting that not all searches of closed containers found in lawfully stopped automobiles are invalid. The Court distinguished between "personal luggage" such as suitcases, which the court found to be entitled to a "reasonable expectation of privacy" and between certain containers which "by their very nature cannot support a reasonable expectation of privacy because their contents can be inferred from their outward appearance." *Id* at 817-818.

In the instant case, Officer Samuilow found the cocaine in an opaque bottle on the rear seat of the car. The bottle was clearly not personal luggage to which the Defendant had a reasonable expectation of privacy. Instead, the bottle was labeled "Filerbits", which Officer Samuilow recognized as heartworm pills for animals and, as such, the officer could infer as to the bottle's content. Accordingly, the Officer's search of the

bottle did not exceed the scope of Defendant's consent to search the automobile.

This being a legal search and seizure, Defendant's Motion to Suppress the cocaine is DENIED.

IT IS SO ORDERED.

/s/ ALICE L. GILBERT
CIRCUIT JUDGE

DATED: July 11, 1984.

OPINION

(State of Michigan — Court of Appeals)

(Dated December 27, 1989)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v DANIEL LEARY, Defendant-Appellant — No. 106348)

Before: Murphy, P.J.,
and MacKenzie and Cavanagh, JJ.

PER CURIAM.

After a bench trial, defendant was convicted on the charge of possession of more than 225 grams but less than 650 grams of the controlled substance cocaine, MCL 333.7403(1), (2)(a)(ii); MSA 14.15(7403)(1), (2)(a)(ii). Defendant was sentenced to a term of twenty to thirty years in prison as mandated by that statute. Defendant now appeals by right challenging the legality of the police search of his automobile and the constitutionality of the statutorily mandated sentence. We affirm.

Defendant first contends that the trial court's denial of his motion to suppress evidence was clearly erroneous because the prosecution failed to present clear and convincing evidence that defendant voluntarily consented to the search. We disagree.

The consent exception to the warrant requirement allows search and seizure without a warrant when consent is unequivocal, specific, and freely and intelligently given. *People* v *Reed*, 393 Mich 342, 362; 224 NW2d 867 (1975), cert den 422 US 1044, 1048 (1975); *People* v *Kaigler*, 368 Mich 281, 294; 118 NW2d 406 (1962). The prosecutor must show that the person consenting to the search was authorized to consent and did

so freely. *People* v *Wagner*, 104 Mich App 169, 176; 304 NW2d 517 (1981). The validity of a consent search is a question of fact. This Court will not reverse a trial court's finding unless it is clearly erroneous under the totality of the circumstances. *People* v *Chism*, 390 Mich 104; 211 NW2d 193 (1973); *People* v *Wagner*, 114 Mich App 541, 547; 320 NW2d 251 (1982).

The arresting officer testified that, as he investigated a minor traffic accident in which defendant was involved, he became increasingly suspicious that drugs were involved with the accident. He based his suspicions on both his own observation of defendant's behavior and appearance and on the other driver's statements concerning defendant's curious behavior.

Eventually, the officer asked defendant if there was anything in his car "that should not be there." Defendant replied, "No, go ahead and take a look for yourself." The officer asked, "You don't mind?" Defendant answered, "No, go ahead." The officer then searched defendant's car. On the back seat he found a brown plastic bottle inside of which were several folded-up plastic bags containing cocaine.

Defendant's testimony was essentially the same as that of the officer. However, defendant said that the officer had actually asked for permission to search and that defendant had replied, "Do what you have to do." Defendant contended that he did not intend to give the officer permission to search the car. The trial court was unpersuaded by defendant's arguments and found that defendant voluntarily consented to the search. We agree. Simply, based on the totality of the circumstances, defendant freely consented to the search. Consequently, the trial court's determination was not clearly erroneous.

Defendant also argues that his so-called consent to the officer's search of his vehicle was involuntary because the officer failed to inform him that he had the right to refuse consent. However, as the trial court found, defendant's knowledge, or lack thereof, of the right to refuse to allow the search is only one of the factors to be considered in a suppression hearing. *Reed, supra* at 362-363; *People* v *Swinford*, 150 Mich App 507, 517-520; 389 NW2d 462 (1986). The trial court's finding that the arresting officer did not mislead defendant concerning the purpose of his investigation was supported by the record and was not clearly erroneous.

Defendant also contends that his consent was coerced because he was illegally detained in the police vehicle at the time he gave it. However, the mere fact that defendant was detained in the rear seat of the police vehicle does not render his consent invalid. *Reed, supra* at 366; *People* v *Klager*, 107 Mich App 812, 817; 310 NW2d 36 (1981). The evidence supported the trial court's finding that there was nothing unreasonable about asking defendant to sit in the rear of the patrol car until the officer completed his accident report. Additionally, the limited scope of the officer's questions to defendant and the circumstances surrounding the manner in which permission to search the car was obtained do not present a situation which was per se coercive.

Similarly, the trial court's finding that the search and seizure of the plastic bottle, in which cocaine was discovered was within the scope of defendant's consent was not clearly erroneous. Relying on *Klager, supra* at 818, the trial court found that the bottle was clearly not the type of *personal luggage* in which defendant had a reasonable expectation of privacy that would

remove it from the scope of his consent to a search of his car.

Defendant next argues that the statutorily mandated sentence of twenty to thirty years in prison under MCL 333.7403(2)(a)(ii); MSA 14.15(7403)(2)(a)(ii) unconstitutionally violates guarantees of equal protection under the law and prohibitions against cruel and unusual punishment. In the alternative, defendant asks this Court to vacate his sentence and to remand for resentencing pursuant to the Legislature's subsequent amendment of the sentencing provisions which reduced the prescribed minimum to ten years and also allowed for indeterminate sentencing. MCL 333.7403(2)(a)(ii), (3); MSA 14.15(7403)(2)(a)(ii), (3), amended by 1987 PA 275.

As defendant concedes, this Court has consistently rejected arguments that the sentencing provisions of the controlled substance article of the Public Health Code impose cruel and unusual punishment-or deny equal protection of the law. See *People* v *Anderson*, __ Mich App __; __ NW2d __ (No. 102587, released November 6, 1989); *People* v *Regelin*, 178 Mich App 128; __ NW2d __ (1989); *People* v *Leighty*, 161 Mich App 565, 583; 411 NW2d 778 (1987); and cases cited therein. See also *Young* v *Miller*, 883 F2d 1276, 1282-1286 (CA 6, 1989), in which the Sixth Circuit United States Court of Appeals upheld the constitutionality of the mandatory life sentence for possession of 650 grams or more of a controlled substance under MCL 333.7401 (2)(a)(i); MSA 14.15(7401)(2)(a)(i). Based upon the analyses in the above cases, we are not convinced that the statutory provisions are unconstitutional.

Defendant relies on *People* v *Schultz*, 172 Mich App 674; 432 NW2d 742 (1988), lv gtd 432 Mich 891 (1989), to argue that the more lenient sentencing provisions of

1987 PA 275 be retroactively applied to his case. The panel in *Schultz* inferred that the amendment of § 7403(2)(a)(ii) was an admission by the Legislature that the twenty-year minimum sentence was unconstitutionally disproportionate to the offense. That panel believed its conclusion was further supported by the addition of a provision which allowed for departure from the statutory sentence for substantial and compelling reasons. *Id.* at 686-687. The panel remanded for resentencing with instructions to retroactively apply the amended sentencing provisions.

The *Schultz* decision is contrary to the majority view of this Court and has been criticized and rejected by later panels. See *Anderson, supra*; *People* v *Jackson*, 179 Mich App 344; ___ NW2d ___ (1989); *People* v *Regelin*, 178 Mich App 128; ___ NW2d ___ (1989), app for lv to appeal held in abeyance pending decision in *Schultz, supra*. Furthermore, amendments to criminal statutes concerning sentences or punishment are not generally retroactive. The sentence or punishment imposed is that prescribed by the statute in force at the time of the commission of the crime. *Jackson, supra* at 351. In addition, 1987 PA 275 contained no express provisions for retroactive application of the amended sentencing provisions and, therefore, should only have prospectively applied. MCL 8.4a; MSA 2.214.

Significantly, the Legislature recently reamended § 7403(2)(a)(ii), reinstating the twenty-year minimum prison term for possession of 225 to 650 grams of a controlled substance. 1989 PA 143, § 1, MCL 333.7403; MSA 14.15(7403), effective ninety days after June 29, 1989. Therefore, if the *Schultz* reasoning is followed to its logical conclusion, one must infer that the Legislature has decided that the original sentencing provision was proportionate and constitutionally sound.

Based on the foregoing, we conclude that defendant's sentence was constitutionally permissible and that the amended provisions of the statute which reduced the mandatory prison term should not be retroactively applied to his case.

Affirmed.

/s/ William B. Murphy
/s/ Barbara B. MacKenzie
/s/ Mark J. Cavanagh

ORDER

(State of Michigan — Supreme Court)

(Dated November 29, 1990)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v. DANIEL LEARY, Defendant-Appellant — No. 88155; COA No. 106348)

By order of July 31, 1990, the application for leave to appeal as held in abeyance pending the decision in *People* v *Sand* (Docket No. 86348) and *People* v *Schultz* (Docket No. 84788). On Order of the Court, the decision having been issued on August 29, 1990, 434 Mich 517, 460 NW2d 505 (1990), the application is again considered, and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we VACATE in part the judgment of the Court of Appeals and we REMAND this case to the Oakland Circuit Court for resentencing in accordance with this Court's decision in *People* v *Schultz*, 435 Mich 517, 460 NW2d 505 (1990). In all other respects, leave to appeal is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Supreme Court, U.S.
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No. 90-1195

In The

Supreme Court of the United States

October Term, 1990

DANIEL LEARY,

Petitioner,

v

STATE OF MICHIGAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

WHETHER A POLICE OFFICER VIOLATED THE FOURTH AMENDMENT WHERE, AFTER OBTAINING A GENERAL CONSENT TO SEARCH AN AUTOMOBILE, HE OPENED A CLOSED, BUT UNLOCKED, OPAQUE MEDICINE JAR FOUND IN THE BACKSEAT OF THE AUTOMOBILE?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

The account of the relevant proceedings set forth in Petitioner's petition is essentially correct. However, his recitation of the facts is somewhat incomplete.

Following a bench trial, Petitioner was convicted of Possession of 225 to 650 grams of Cocaine, contrary to MCL 333.7403(1), (2)(a)(ii); MCL 333.7214(a)(iv). He was sentenced to serve 20-30 years imprisonment.

At trial, the evidence was all stipulated to and the only witness gave a brief summary of the facts. (T, 9-13). Petitioner did not cross-examine the testifying officer. (T, 13). The People rested. Petitioner offered no argument. (T, 14). The court found Petitioner guilty as charged. (T, 14-15).

Prior to trial, Petitioner had challenged the search that resulted in the discovery of the cocaine. A sup-

pression hearing was conducted over several days.[1] The trial court issued an opinion denying Petitioner's motion to suppress the evidence. The denial of that motion is the mainstay of Petitioner's appeal.

At the suppression hearing, Officer John Samuilow, of the Troy Police Department, testified that he was dispatched on December 28, 1982 at 2:30 p.m. to investigate a traffic accident. (EH1, 3-4). The officer found both parties to the accident and their cars at a gas station. (EH1, 5-6). One of the two male subjects was the Petitioner. (EH1, 7). Both men approached the officer. The officer asked both for their license and vehicle registration. (EH1, 7).

The other party, George Durkee, gave the officer the requested documents. The Petitioner asked, "What do they look like?" The officer explained to the Petitioner what the items looked like and Petitioner went to his car to get them. (EH1, 8). While Petitioner was gone, Durkee told the officer that Petitioner had not wanted to call in the police. Petitioner had wanted to settle the matter between themselves. (EH1, 9-10). Durkee also commented to the officer the Petitioner's behavior was strange. (EH1, 10). Additionally, right after the accident, Petitioner handed a small package to the occupants of another car. (EH1, 10). Durkee told the officer that he thought Petitioner was on "dope." (EH1, 11).

Petitioner returned to where the officer and Durkee were. He gave the officer a Florida driver's license and a Michigan registration, saying the car belonged to his

---

[1] References to the transcripts of the evidentiary hearing will be as follows: "EH1" refers to the proceedings on February 23, 1984; "EH2" refers to the proceedings on February 23, 1984 where Petitioner testified; and, "EH3" refers to the proceedings of March 29, 1984.

brother-in-law. Both Durkee and Petitioner were in the backseat of the officer's patrol car answering questions about the accident. (EH1, 13). The officer observed that the Petitioner's eyes were red and that he was constantly wiping his nose for no apparent reason. (EH1, 14). The officer thought Petitioner might be on some prescription drug and that that fact might somehow be related to the accident. The officer asked Petitioner for a second time whose car it was. This time Petitioner answered that it was his stepbrother's. (EH1, 15). The officer became suspicious. (EH1, 16).

The officer inquired of Petitioner whether he had spoken to anyone at the accident scene other than Durkee. (EH1, 16). Petitioner said no. When confronted with Durkee's representation that Petitioner had passed a package to the occupants of another car, Petitioner said that he had spoken to some friends at the scene. He denied anything about a package. The officer became suspicious. Samuilow asked the Petitioner again whose car it was. This time Petitioner said it was a friend's. (EH1, 17).

When asked about drinking or drugs, Petitioner denied having used either. The officer asked Petitioner if there was anything in the car that should not be. According to the officer, Petitioner replied, "No, go ahead and take a look for yourself." (EH1, 18). The officer asked, "You don't mind?", to which the Petitioner responded, "No, go ahead." (EH1, 18-19).

The officer went up to Petitioner's car and looked inside. (EH1, 23). Samuilow opened the door and saw a brown cardboard box in the backseat. Next to the box was a brown bottle or jar with a white top. The officer recognized the name of an animal drug on the bottle. (EH1, 24). He picked up the bottle and opened it. (EH1, 25). Inside were some pills and nine folded

plastic bags containing white powder. (EH1, 26). The officer asked Petitioner if he knew what the substance was. Petitioner responded that he wanted to talk to his attorney. (EH1, 27).

Samuilow radioed in for assistance. The officer who arrived on the scene identified the powder as cocaine. (EH1, 28). Petitioner was arrested for possession of a controlled substance. (EH1, 32).

Petitioner testified at the suppression hearing. He denied giving the officer permission to look in the car. When Samuilow asked if there was anything in the car that should not be, Petitioner testified he said "no." Petitioner contended that the officer then said, "Well, if that's the case, then you wouldn't mind if I looked in your car." (EH2, 10). Petitioner testified he asked the officer, "For what reason," not knowing whether or not the officer had a right to look in. Accordingly, Petitioner claimed he told the officer to "do what you have to do." (EH2, 11). However, Petitioner felt he had by these words not given consent to search the car. (EH2, 14-18).

On cross-examination, Petitioner related that the car accident occurred as he tried to enter a parking lot. Petitioner was supposed to meet someone at the parking lot and deliver a package. (EH2, 15). After the accident, the people he was supposed to meet arrived. (EH2, 15-17). He gave them a "gift" and the people left. (EH2, 17).

Petitioner acknowledged that he never told the officer not to look in the car. (EH2, 18). He had remained at the scene of the accident voluntarily. (EH2, 17). The officer testified that Petitioner was free to leave the area at any time but that he, the officer, was going to keep the Petitioner's driver's license and

registration until preparation of the accident report was completed. Petitioner was not in custody until arrested for the possession of cocaine. (EH1, 32). In fact, Petitioner had the door of the patrol car open while he was inside. (EH3, 21). Petitioner was not a prisoner.

The circuit court found that Petitioner had consented to the search of his automobile. (Whether the officer asked to search the car or Petitioner invited the officer to search the car is of little moment since under either scenario Petitioner gave his consent.)

REASON FOR DENYING THE WRIT

A GENERAL AND UNRESTRICTED CONSENT TO SEARCH AN AUTOMOBILE AUTHORIZES THE SEARCH OF ALL CONTAINERS FOUND INSIDE THE AUTOMOBILE.

Petitioner contends that the general consent he gave to search his automobile, as found by the trial court, did not authorize the opening of a closed medicine jar found in the backseat of that car. Respondent submits that Petitioner's attempt to limit by law the unrestricted consent he granted should not be permitted. Such an interpretation would contradict this Court's holdings in closely-related areas involving searches.

This Court in *United States* v *Ross*, 456 US 798, 825 (1982), held that under the "automobile exception" to the Fourth Amendment's warrant requirement, a warrantless search of an automobile based on probable cause extended to every part of that vehicle including its contents that might conceal the object of the search. This Court noted that if the permissible scope of a warrantless search of an automobile did not include containers and packages therein, the efficacy of such searches would be practically nullified:

> Contraband goods rarely are strewn across the trunk or floor of a car; since by their very nature such goods must be withheld from public view, they rarely can be placed in an automobile unless they are enclosed within some form of container.
>
> 456 US at 820. (footnote omitted)

In the footnote supporting this observation, the Court pointed out:

> During virtually the entire history of our country — whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile — it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search.
>
> 456 US at 820, n 26.

This Court in analyzing the lawful scope of a search of a specified area explained that "nice distinctions" must give way in deciding which components may be searched:

> A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, and containers in which the weapon might be found. A warrant to open a footlocker to search for marijuana would also authorize the opening of packages found inside. *A warrant to search a*

> *vehicle would support a search of every part of the vehicle that might contain the object of the search. When a legitimate search is under way,* and when its purpose and its limits have been precisely defined, *nice distinctions* between closets, drawers, and containers, in the case of a home, or *between glove compartments, upholstered seats, trunks, and wrapped packages,* in the case of a vehicle, *must give way to the interest in the prompt and efficient completion of the task at hand.*
>
> *This rule applies equally to all containers,* as indeed we believe it must.
>
> 456 US at 820-822. (footnotes omitted; emphasis added)

The Court noted that on a practical level a prohibition against opening containers could exacerbate an intrusion into an automobile:

> The practical considerations that justify a warrantless search of an automobile continue to apply until the entire search of the automobile and its contents has been completed. Arguably, the entire vehicle itself (including its upholstery) could be searched without a warrant, with all wrapped articles and containers found during that search then taken to a magistrate. But prohibiting police from opening immediately a container in which the object of the search is most likely to be found and instead forcing them first to comb the entire vehicle would actually exacerbate the intrusion on privacy interests. Moreover, until the container itself was opened the police could never be certain that the contraband was not secreted in a yet undiscovered por-

> tion of the vehicle; thus in every case in which a container was found, the vehicle would need to be secured while a warrant was obtained. Such a requirement would be directly inconsistent with the rationale supporting the decisions in *Carroll* [v *United States*, 267 US 132 (1925)] and *Chambers* [v *Maroney*, 399 US 42 (1970)]. Cf. nn. 19 and 22, *supra*.

As noted in *Ross*, 456 US at 825, the scope of a permissible warrantless search would be no broader and no narrower than a magistrate could legitimately authorize by a warrant.

Although *Ross* involved a probable cause search, the Court's analysis should apply with equal vigor to consent searches. The scope of an officer's authority to search should not be restricted simply because it was authorized by a defendant's consent instead of from probable cause found by either a magistrate or a police officer. When an individual gives the police general, unrestricted permission to search his car, he should naturally expect that containers therein will also be searched as part of the search of the car.

In the instant case, given that Petitioner had been involved in a traffic accident and had been described as possibly on "dope," as having wanted to avoid the police and as having red eyes and as constantly wiping his nose for no apparent reason, it was reasonable to expect that the officer would be interested in the medicine bottle or jar in the backseat of Petitioner's automobile. Petitioner did not limit his consent in any way to the search.

As noted in 3 LaFave, *Searches and Seizures*, § 8.1(c), (2d ed, 1987) at 160:

> Consents to search are not given in the abstract; the police are interested in searching a

> particular place, and thus it is the practice for them to specify a certain place, such as a residence or vehicle. If, as is likely, the consent given in response is general and unqualified, then the police may proceed to conduct a general search of that place.
>
> (footnotes omitted).

Once the parameters of the consent search are established, there are still inner limits. Usually, however, such limits do not prohibit the opening of closed but unlocked containers:

> Assuming . . . a general and unqualified consent was given, then the boundaries of the place referred to mark the outer physical limits of the authorized search. Even within those limits, however, the police do not have carte blanche to do whatever they please. Certainly they may not engage in search activity which involves the destruction of property, and this would seem to bar breaking into locked containers. Somewhat more difficult is the question of *whether such a general consent permits the opening of closed but unlocked containers* found in the place as to which consent was given. *Ordinarily, it would appear that the answer is yes,* particularly if the police have indicated they are searching for a small object which might be concealed in such a container.
>
> *Id.*, at 161. (emphasis added)[2]

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[2] Petitioner relies upon *State* v *Wells*, 539 So2d 464 (Fla, 1989), *aff'd on other grounds* 110 S Ct 1632 (1990). However, there the police after obtaining consent to search the trunk of a car found a piece of locked luggage. They broke open the locked luggage with a knife. In the instant case, the police did not have to break open the closed jar. Thus the intrusion was not as great since there was no property damage.

In fact, most courts have held that a general consent permits the opening of containers found in the place for which consent was given, particularly in the case of cars. *See: United States* v *Smith*, 901 F2d 1116, 1118 (D.C. Cir), *cert denied* 111 S Ct 172 (1990); *United States* v *Battista*, 876 F2d 201 (D.C. Cir 1989) (the Court rejected the notion that to search a suitcase an officer would have to play a game of "Mother-may-I" where he would have to ask for permission to remove each article from the suitcase to see what lay underneath); *United States* v *Anderson*, 859 F2d 1171 (3d Cir 1988); *United States* v *Sealey*, 830 F2d 1028, 1032 (9th Cir 1987); *United States* v *Dyer*, 784 F2d 812, 816 (7th Cir 1986); *United States* v *Kapperman*, 764 F2d 786, 794 (11th Cir 1985); *United States* v *Covello*, 657 F2d 151 (7th Cir 1981); *Gamble* v *State*, 318 Md. 120, 567 A2d 95 (1989); *People* v *Mirenda*, 57 NY2d 261, 455 NYS2d 752, 442 NE2d 49 (1982).

In sum, Petitioner's Fourth Amendment rights were not violated where the search of the medicine jar in his automobile was the natural outgrowth of the general, unlimited consent he gave to search his auto.[3] Any other holding would create a new fuzzy area in the law of search and seizure where extensive line-drawing would have to be indulged in by the courts involving "fine distinctions."

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[3] Admittedly, a similar issue is pending before this Court in *Florida* v *Jimeno, cert granted*, No. 90-622. If this Court finds the question in *Jimeno* to be identical to that of the case at bar, certiorari should not be granted. Instead, Petitioner's petition should be held pending this Court's resolution of *Jimeno* and then be disposed of accordingly.

CONCLUSION

WHEREFORE, the Respondent prays that this Honorable Court issue an order denying the Petitioner's petition for Writ of Certiorari to the Michigan Supreme Court.

Respectfully submitted,

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